

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
CYBER CHAMPION INTERNATIONAL, LTD.,

Case No.: 07 CV 9503 (LAK)

Plaintiff,

- against -

CARLOS FALCHI, MARCOS FALCHI, and
XYZ COMPANIES,

Defendants.

-----X

**AFFIRMATION OF HARLAN M. LAZARUS, ESQ. IN OPPOSITION TO THE
MOTION OF DEFENDANT MARCOS FALCHI, TO DISMISS THE
COMPLAINT OF PLAINTIFF, CYBER CHAMPION INTERNATIONAL, LTD.**

Harlan M. Lazarus, Esq., an attorney at law duly admitted to practice before this
Court, under penalty of perjury, affirms the following to be true:

1. I am a member of the firm of Lazarus and Lazarus, P.C., attorneys for Plaintiff
Cyber Champion International, Ltd. ("Cyber").
2. I submit this Affirmation in Opposition to the Motion of Defendant Marcos
Falchi ("Marcos") To Dismiss the Complaint of Plaintiff (the "Motion").
3. I limit this Affirmation to *a*) matters material to so much of Marcos' Motion
seeking dismissal for "insufficiency of process" pursuant to Fed. R. Civ. P. 12 (b)
(5); and *b*) placing documentary evidence more conveniently before the Court.

THE ADDITIONAL SERVICES

4. I have annexed as *Exhibit F* to this Affirmation an Affidavit Of Service of Summons and Complaint sworn to by Juan D. Aguirre ("Aguirre"), License Number 843839, setting forth service of the Summons and Complaint in the above captioned action (the "Action") by, *inter alia*, delivering a copy to a "suitable person", Alex Falchi, Marcos Falchi's son on January 25th, 2008 and a subsequent mailing on January 28th, 2008 to Marcos at Marcos' "actual place of business" at 260 W. 39th Street, New York, N.Y. 10018. This service was made pursuant to New York C.P.L.R. §308 (2).
5. I have annexed as *Exhibit G* to this Affirmation an Affidavit Of Service of Summons and Complaint sworn to by Jerome E. Goldman ("Goldman"), License No. 1239192, setting forth service of the Summons and Complaint in the Action by, *inter alia*, after five attempts at serving Marcos or a "suitable person", at Marcos' home address at 320 East 42nd Street, New York, New York, #905, "affixing" the Summons and Complaint to the door of Marcos' home, and mailing to Marcos' home address on January 31st, 2008. Marcos' current home address is disclosed at ¶1 of Marcos' Declaration in Support of Motion. §308 (4)
6. The "service" subject of paragraph 4 and 5, above are hereinafter, and in the accompanying Memorandum of Law, referred to as the "Additional Service[s]".

7. I have annexed as *Exhibit H* to this Affirmation the Affidavit of John Dicanio ("Dicanio") of Serving by Irving, Inc.. Upon information and belief, Dicanio, also a licensed process server, supervised Aguirre and Goldman in connection with the Additional Services.
8. Dicanio's affidavit details his supervision of the Additional Services, and the sequencing and circumstances thereof.
9. I have annexed as *Exhibit I* to this Affirmation the Affidavit of Carissa Schumacher ("Schumacher"), a paralegal working at my offices under my direct supervision.
10. At my request, and to verify, 260 West 39th Street as Marcos' "actual place of business", Schumacher undertook the actions described in the Schumacher Affidavit. I requested Schumacher to undertake the activities because the 260 West 39th Street subject of the Aguirre Affidavit of Service is the same "actual place of business" address at which the challenged service upon Marcos was made. (The challenged service, however, was made at the 8th floor at 260 West 39th Street, and the "suitable person", unlike the service subject of the Aguirre Affidavit, was not Marcos' son, Alex.
11. The Schumacher Affidavit, and, in particular, the Aguirre Affidavit as detailed in the Dicanio Affidavit, casts doubt upon the bona fides of Marcos' insufficient

service of process claim; it does appear that 260 West 39th Street is Marcos' "actual place of business. As set forth in the accompanying Memorandum of Law, Marcos' admissions further indicate that Marcos' "actual place of business" is at 260 West 39th Street.

12. However, the Court need not necessarily address the factual issues relating to 260 West 39th Street because Cyber has properly and timely made service upon Marcos by the service detailed in the Goldman Affidavit of Service. Marcos admits that 320 East 42nd Street, New York, New York, #905 is his "actual place of business"; moreover, the Goldman Affidavit of Service indicated five attempts to serve Marcos personally at Marcos this address, or by "suitable person" service and the required mailing¹.

13. With respect to the Additional Services, affidavits of services are on file with this Court.

OTHER MATERIALS

14. I have annexed as *Exhibit A* to this Affirmation an additional copy of an electronic mail, included in Exhibit D to the Complaint, from the Co-Defendant Carlos Falchi ("Carlos") to Cyber dated September 13, 2006, wherein Carlos

¹Goldman's Affidavit of Service "checks" the box designating "Mailing to Residence...". The Schumacher Affidavit of Service also indicates that the 320 East 42nd Street address is a residential building. Whether the address is Marcos's residence or his "actual place of business" is immaterial as Marcos was clearly served, and any discrepancy stated in the affidavits of service can be cured with an amendment thereof.

discloses a prior period when Marcos was not working with Carlos and Marcos' subsequent "joining" Carlos. Carlos' answer admits Carlos' work address as 260 West 39TH Street.

15. I have annexed as *Exhibit B* to this Affirmation an additional copy of an electronic mail included in Exhibit D to the Complaint, from Carlos to me dated September 12, 2006, wherein, in addition to repeating the substance of the September 13, 2006 electronic mail to Cyber, Carlos states, "Please note that since I brought Carlos to work with me...."
16. I have annexed as *Exhibit C* to this Affirmation a copy of Carlos's Answer.
17. I have annexed as *Exhibit D* to this Affirmation a copy of the Affidavit of Service reflecting service of the Summons and Complaint upon Carlos's "business" address at 260 West 39th Street.
18. I have annexed as *Exhibit E* to this Affirmation a copy of the Affidavit of Service reflecting the challenged "leave and mail" service of the Summons and Complaint upon Marcos at 260 West 39th Street.
19. In view of the Motion, it is respectfully requested that the Court set a Motion Conference to reset the dates set forth in the Consent Scheduling Order, dated December 21, 2007, annexed hereto as *Exhibit J*.

CONCLUSION

For all the reasons set forth herein, it is respectfully requested that the Motion of Defendant Marcos Falchi to Dismiss Cyber's Complaint, with prejudice pursuant to Fed. R. Civ. P. 12 (b) (5), 12 (b) (6) and Fed. R. Civ. P. 9(b) be denied. Alternatively, and with respect to any causes of action deemed by the Court to be deficient, Cyber begs leave to replead.

Respectfully submitted this 1st day of February, 2008.

LAZARUS & LAZARUS, P.C.
Attorneys for Plaintiff,
Cyber Champion International, Ltd.

By: _____
HARLAN M. LAZARUS (HML-0268)
240 Madison Avenue, 8th Floor
New York, New York 10016
Tel. (212) 889-7400

TO: MALDJIAN & FALLON LLC,
Attorneys for Defendant, Marcos Falchi
Intellectual Property Counsel
365 Broad Street, 3rd Floor
Red Bank, NJ 07701
Attn: BRIAN GAYNOR, ESQ.

- and -

TO: BALLON STOLL BADER & NADLER, P.C.,
Attorneys for Defendant, Carlos Falchi
1450 Broadway, 14th Floor
New York, NY 10018-2268
Attn: DWIGHT YELLEN, ESQ

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
CYBER CHAMPION INTERNATIONAL, LTD.,

Case No.: 07 CV 9503 (LAK)

Plaintiff,

- against -

CARLOS FALCHI, MARCOS FALCHI, and
XYZ COMPANIES,

Defendants.

-----X

**AFFIRMATION OF HARLAN M. LAZARUS, ESQ. IN OPPOSITION TO THE
MOTION OF DEFENDANT MARCOS FALCHI, TO DISMISS THE
COMPLAINT OF PLAINTIFF, CYBER CHAMPION INTERNATIONAL, LTD**

LAZARUS & LAZARUS, P.C.
Attorneys for Defendants
240 Madison Avenue, 8th Floor
New York, New York 10016
Tel. (212) 889-7400